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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

PATRICK QUIROZ, DOMINIQUE
MIRZA, and LOUISE CRESPO, on
behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

SABATINO TRUFFLES NEW YORK,
LLC and SABATINO NORTH
AMERICA, LLC,

Defendants.

Case No. 8:17-cv-00783-DOC-KES

**PLAINTIFFS' MOTION TO
QUASH SUBPOENA ADDRESSED
TO NSF INTERNATIONAL
AUTHENTECHNOLOGIES**

Date: January 29, 2018

Time: 8:30 a.m.

Ctrm: 9D

Judge: Hon. David O. Carter

For the reasons set out below, Plaintiffs respectfully request that the Court quash the subpoena that Defendants Sabatino Truffles New York, LLC and Sabatino North America, LLC (collectively, “Sabatino”) have served on their non-testifying consulting expert NSF International AuthenTechnologies.

I. BACKGROUND

This case is about whether Sabatino’s “Black Truffle Infused Olive Oil” and “White Truffle Infused Olive Oil” (collectively, “the Products”) are made with actual truffles. Accordingly, as part of their investigation, Plaintiffs hired NSF International AuthenTechnologies (“NSF”) as a non-testifying consulting expert and commissioned it to conduct DNA testing on Products.

On December 1, 2017, Sabatino served a subpoena on NSF requesting a number of different categories of documents related to the testing that Plaintiffs commissioned. Fisher Decl. Ex. A (“NSF Subpoena”). For the reasons set out below, these documents are all privileged pursuant to Federal Rule of Civil Procedure 26(b)(4)(D) and the NSF Subpoena should be quashed in its entirety.

II. ARGUMENT

Rule 26(b)(4)(D) severely restricts discovery of materials from non-testifying consulting experts:

Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

Fed. R. Civ. P. 26(b)(4)(D). As one court explained,

1 This Rule recognizes that with non-testifying experts, there
 2 is no need to obtain discovery for effective cross-
 3 examination. . . . The Rule is also designed to prevent a
 4 party from building his case on the diligent preparation of
 5 his adversary. *Adams v. Shell Oil Co.*, 132 F.R.D. 437,
 6 440 (E.D. La. 1990) (citation omitted). Under [the prior
 7 version of current Rule 26(b)(4)(D)], a requesting party's
 8 burden of establishing "exceptional circumstances" has
 9 been described as a "'heavy' one." *Hartford Fire Ins. Co.*
 10 *v. Pure Air on the Lake Ltd.*, 154 F.R.D. 202, 208 (N.D.
 11 Ind. 1993) (quoting *Shell Oil*, 132 F.R.D. at 442). The rule
 12 is intended to allow litigants to consult experts in order to
 13 evaluate a claim "without fear that every consultation with
 14 an expert may yield-grist for the adversary's mill." *Rubel*
 15 *v. Eli Lilly and Co.*, 160 F.R.D. 458, 460 (S.D.N.Y. 1995).

16 *K.C.R. v. Cty. of Los Angeles*, 2014 WL 12725471, at *2–3 (C.D. Cal. Aug. 7, 2014)
 17 (quoting *Moore U.S.A. Inc. v. Standard Register Co.*, 206 F.R.D. 72, 75 (W.D.N.Y.
 18 2001); *Bravo v. City of Santa Maria*, 2013 WL 12224037, at *15 (C.D. Cal. July 1,
 19 2013) ("Rule 26(b)(4)(D) acts as a shield permitting parties to prepare for trial by
 20 consulting with whomever they choose without fear of the opposing party
 21 discovering that preparation. It has similar interests to those found in the work
 22 product doctrine, which also protects matters prepared in anticipation of litigation.")
 23 (citation omitted); *Chiquita Int'l Ltd. v. M/V Bolero Reefer*, 1994 WL 177785, at *1
 24 (S.D.N.Y. May 6, 1994) (a consulting expert who will not testify at trial "is generally
 25 immune from discovery.").¹

26 Here, there is little doubt that Plaintiffs hired NSF as a non-testifying
 27 consulting expert and that the documents that Defendant requests in the NSF
 28 Subpoena are protected Rule 26(b)(4)(D). NSF is undoubtedly an expert in that it
 brought its technical background to bear on the testing for truffle DNA in the

¹ "Although the Rule specifically mentions only interrogatories and deposition, case law supports the view that it applies with equal force to document requests." *ExxonMobil Oil Corp. v. S. California Edison Co.*, 2014 WL 12629792, at *3 n.1 (C.D. Cal. Feb. 4, 2014).

1 Products at issue. There can also be no dispute that Plaintiffs hired NSF in
2 anticipation of litigation and as part of their continuing investigation into Sabatino's
3 fraudulent practices. In addition, Plaintiffs do not intend to name NSF or any
4 employee thereof as a testifying expert in this matter. As such, the documents
5 sought in the NSF Subpoena are precisely the types of materials that are protected by
6 Rule 26(b)(4)(D).

7 Nor have Plaintiffs waived these protections by referencing the NSF test
8 results in the First Amended Complaint ("FAC"). Indeed, numerous courts have
9 held that the protections for non-testifying consulting experts are not subject to
10 waiver at all. *See, e.g., Genesco Inc. v. Visa, Inc.*, 2015 WL 13376284, at *1 (M.D.
11 Tenn. Mar. 25, 2015) ("Expert consultant's materials are not subject to waiver under
12 Fed. R. Civ. P. 26(b)(4)(D)"); *Eidos Display, LLC v. Chunghwa Picture Tubes, Ltd.*,
13 296 F.R.D. 3, 7 (D.D.C. 2013) ("While it is unclear whether Rule 26(b)(4)(D) is
14 even subject to waiver, the general trend in other districts has been to find that it is
15 not."); *Precision of New Hampton, Inc. v. Tri Component Prods. Corp.*, 2013 WL
16 2444047, at *5-6 (N.D. Iowa June 5, 2013) (finding that it "appears dubious that the
17 waiver doctrine applies to" the non-testifying expert privilege); *Ludwig v. Pilkington*
18 *N. Am., Inc.*, 2003 WL 22242224, at *3 (N.D. Ill. 2003) (finding that where a party
19 enjoys protection under Rule 26(b)(4)(D), the protection is not subject to waiver).

20 Accordingly, even a partial disclosure of materials otherwise protected under
21 Rule 26(b)(4)(D) will not constitute a waiver. *Vanguard Savings & Loan Ass'n v.*
22 *Banks*, 1995 WL 71293 (E.D. Pa. 1995) (finding it immaterial that the plaintiff may
23 have voluntarily disclosed the expert report to third parties, and stressed that the only
24 relevant question is whether the plaintiff meets the requirements of Rule
25 26(b)(4)(B)); *Hollinger Intern. Inc. v. Hollinger Inc.*, 230 F.R.D. 508, 522 (N.D. Ill.
26 2005) ("Courts have generally held that partial disclosure of a non-testifying expert's
27 work product does not waive a party's right to withhold production of the expert's
28

1 undisclosed work product.”); *see also ICE Corp. v. Hamilton Sundstrand Corp.*,
2 2007 WL 4239453, at *3 (D. Kan. Nov. 30, 2007).

3 As such, Sabatino has no basis for arguing that Plaintiffs have waived their
4 protections under Rule 26(b)(4)(D). It does not matter that Plaintiffs referenced the
5 test results in the FAC—or even that they produced the test results themselves—
6 because they have no intent to use those test results as substantive evidence in this
7 litigation. *Dover v. British Airways, PLC (UK)*, 2014 WL 5090021, at *1 (E.D.N.Y.
8 Oct. 9, 2014) (holding that a deposition was improper when non-testifying expert
9 analysis was disclosed for support in the complaint and opposition to motion to
10 dismiss, and there was no intent to use the expert’s analysis going forward); *Dane*
11 *Techs., Inc. v. Gatekeeper Sys., Inc.*, 2015 WL 12819180, at *8 (D. Minn. Jan. 20,
12 2015) (“The submission of this non-testifying expert’s declaration in support of
13 opening invalidity contentions did not waive the protection afforded to the expert”);
14 *Plymovent Corp. v. Air Tech. Solutions, Inc.*, 243 F.R.D. 139, 144 (D.N.J. 2007)
15 (holding that a non-testifying expert’s video and report in support of a motion for
16 preliminary injunction does not make the expert subject to a deposition); *U.S.*
17 *Inspection Services, Inc. v. ML Engineered Solutions, LLC*, 268 F.R.D. 614 (N.D.
18 Cal. 2010) (holding that there was no subject-matter waiver of Rule 26(b)(4)(D)
19 protection where a party voluntarily produced several documents relating to a non-
20 testifying expert to the opposing party because there was no indication that the party
21 intended to make use of the disclosed documents setting forth the expert’s analysis
22 while withholding others).

23 Finally, Sabatino cannot demonstrate that it falls under either of the exceptions
24 set out in Rule 26(b)(4)(D). Rule 35(b), which pertains to the report of an examiner
25 who is performing a mental or physical exam pursuant to court order, is inapplicable.
26 Likewise, Sabatino cannot argue that this case involves “exceptional circumstances
27 under which it is impracticable for the [it] to obtain facts or opinions on the same
28

1 subject by other means.” Rule 26(b)(4)(D)(ii). If Sabatino wants DNA testing for
2 the Products, it is free to commission its own testing.

3 **III. CONCLUSION**

4 For the reasons set forth above, Plaintiffs respectfully request that the Court
5 quash the NSF Subpoena.

6
7 Dated: December 11, 2017 Respectfully submitted,

8 **BURSOR & FISHER, P.A.**

9
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